

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ULISES MURILLO PERLA**

Claimant

VS.

**FRY WAGNER MOVING & STORAGE**

Respondent

AND

**PENNSYLVANIA MANUFACTURERS  
ASSOCIATION**

Insurance Carrier

Docket No. 1,051,775

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the February 16, 2012, Order entered by Administrative Law Judge Kenneth J. Hursh. The Director appointed Jeffrey King to serve as Appeals Board Member Pro Tem in place of recused Board Member Gary R. Terrill. C. Albert Herdoiza, of Kansas City, Kansas, appeared for claimant. Michael D. Streit, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent). This claim was placed on the Board's summary calendar for determination without oral argument.

The Administrative Law Judge (ALJ) denied claimant's request for a preliminary hearing and held that claimant's only recourse on a post-award medical is a K.S.A. 44-510k post award medical hearing.

**ISSUES**

Claimant contends the ALJ erred in determining a preliminary hearing was an inappropriate means by which claimant could pursue post award medical treatment.

Respondent argues that the ALJ has the jurisdiction to hear claimant's post award medical request and has the jurisdiction to determine the procedure claimant must adhere

to for the post award medical request. Respondent asserts the ALJ correctly concluded that claimant's post award request is procedurally bound to be conducted under K.S.A. 44-510k and K.S.A. 44-523.

The issue for the Board's review is: Can claimant pursue a post award medical request in a preliminary hearing or must the request be pursued in a post award medical hearing?

#### **FINDINGS OF FACT**

Claimant injured his low back while working for respondent on April 28, 2010. He was moving furniture when he felt a sharp pain in his low back. An Award was entered in his workers compensation claim on June 16, 2011, wherein claimant was found to have a 7.5 percent functional impairment and a 70.5 percent permanent partial general (work) disability. On the issue of future medical, the ALJ held: "The record in this case did not show it is more probably true than not that additional medical treatment is necessary after maximum medical improvement, see K.S.A. 44-510h(e)<sup>1</sup>, so future medical benefits shall not be awarded."<sup>2</sup>

Claimant filed an Application for Post Award Medical on November 22, 2011. On November 29, 2011, claimant filed an Application for Preliminary Hearing and an Application for Post Award Medical. A Post Award Hearing was held January 18, 2012, where testimony was taken of claimant. The ALJ gave claimant and respondent terminal dates, although claimant's attorney stated he would probably come back and ask for the request to be presented at a preliminary hearing.

A preliminary hearing was held in this matter on February 15, 2012. No testimony was taken but Dr. Fernando Egea's report of November 9, 2011, was entered as an exhibit. Claimant's attorney argued that a preliminary hearing is permitted in post award medical cases pursuant to *Siler*.<sup>3</sup> Respondent's attorney argued that claimant cannot utilize the preliminary hearing procedure to obtain medical benefits post-award and is not entitled to post award medical benefits because the Award entered June 16, 2011, denied future medical benefits and that Award was not appealed.

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<sup>1</sup> K.S.A. 44-510h was amended by L. 2011, ch. 55, sec. 11. The Board has held that this amendment should be applied prospectively to cases where the injury occurs on or after May 15, 2011, the effective date of the statute. The ALJ, however, applied the new language in K.S.A. 2011 Supp. 44-510h when he entered his order.

<sup>2</sup> ALJ Award (June 16, 2011) at 5.

<sup>3</sup> *Siler v. U.S.D. No. 512*, 45 Kan. App. 2d 586, 251 P.3d 92 (2011), *rev. denied* \_\_ Kan. \_\_ (2012).

**PRINCIPLES OF LAW**

K.S.A. 2009 Supp. 44-510k(a) states:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

K.S.A. 44-534a(a) states:

(1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative

law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

### ANALYSIS

The preliminary hearing statute, K.S.A. 44-534a, by its terms, does not preclude the use of the preliminary hearing procedure to obtain medical treatment and/or temporary total disability compensation post award, that is, unless the term "preliminary" is defined as meaning prior to the entry of a final award. The Kansas Court of Appeals approved the use of the preliminary hearing procedure to determine a claimant's right to medical treatment post award in *Siler*. The ALJ distinguished *Siler* from the case at bar because in *Siler*, the application for preliminary hearing was filed by the respondent, not by the claimant, as in this case. However, the Court of Appeals in *Siler* also said that the preliminary hearing procedure was equally available to both claimants and respondents.<sup>4</sup>

Finally, *Siler* still has the right to seek future medical treatment. In 2004, while the stipulated order was in effect, the ALJ issued a preliminary order extending Dr. Sabapathy's treatment for an additional 90 days over the objection of

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<sup>4</sup> It is also worth noting that the post award medical statute, K.S.A. 44-510k, makes no mention of temporary total disability benefits. It remains to be seen whether the Kansas appellate courts will permit a claimant who receives post award medical treatment benefits such as surgery, for example, to also be awarded temporary total disability compensation under K.S.A. 44-510k or would have to instead follow another procedure for those benefits, such as K.S.A. 44-534a or K.S.A. 44-528.

U.S.D. 512. *If Siler believes a course of treatment would be beneficial, she may seek her own preliminary order authorizing treatment.* Because she is still able to seek treatment, the ALJ's preliminary order is not a termination of her right to seek treatment. (Emphasis added.)<sup>5</sup>

### **CONCLUSION**

The ALJ erred in holding the preliminary hearing procedure provided in K.S.A. 44-534a was unavailable to a claimant seeking post award medical treatment and that claimant's only recourse on a post award medical issue is K.S.A. 44-510k.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated February 16, 2012, is reversed and this matter is remanded to the ALJ for further proceedings and/or orders consistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>5</sup> *Siler*, 45 Kan. App. 2d at 591.

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Kenneth J. Hursh, Administrative Law Judge